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No. 01-1080

IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* THE PROGRESS AND FREEDOM FOUNDATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The Progress & Freedom Foundation ("PFF") is a non-profit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3).[1] The foundation's principal mission is studying the impact of the digital revolution and its impact on public policy. In this

[1] The consent of the parties to the filing of this *amicus curiae* brief has been obtained and is filed with the Clerk of the Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

capacity, it conducts research in fields such as electronic commerce, telecommunications, and the impact of technology on government, society, and economic growth.

PFF's interest in this case stems from the work it has done in the First Amendment area primarily in connection with its Communications Policy Studies program and in the privacy area in connection with its ongoing project, "Regulating Personal Information: Balancing Benefits and Costs." Among many other writings, PFF's senior fellows have filed comments before the Federal Communications Commission urging the agency to respect the First Amendment interests at stake in the agency's regulatory actions,[2] and they have recently authored two books examining various privacy related issues.[3] A PFF senior fellow testified in March 2001 before a congressional committee on the subject of "Privacy in the Commercial World."[4]

The issues presented in this case concerning the lawfulness of the Federal Trade Commission's restriction on the

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[2] *See, e.g.*, Jeffrey A. Eisenach and Randolph J. May, Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Comments of The Progress & Freedom Foundation, CS Docket No. 98-82, January 4, 2002; Jeffrey A. Eisenach, Thomas M. Lenard, and James W. Harper, Implementation of the Telecommunications Act of 1996, Reply Comments of The Progress & Freedom Foundation, CC Docket No. 96-115, November 16, 2001; Jeffrey A. Eisenach and Randolph J. May, Comments of the Progress & Freedom Foundation, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, March 27, 2000.

[3] *See* Paul H. Rubin and Thomas M. Lenard, PRIVACY AND THE COMMERCIAL USE OF PERSONAL INFORMATION (Kluwer Academic Publishers 2001); Alan Charles Raul, PRIVACY AND THE DIGITAL STATE: BALANCING PUBLIC INFORMATION AND PERSONAL PRIVACY (Kluwer Academic Publishers 2001).

[4] *See* Testimony of Paul H. Rubin before the House Committee on Commerce, Subcommittee on Commerce, Trade and Consumer Protection, March 1, 2001.

dissemination of target market information, therefore, are of interest to PFF because of their importance in establishing the proper balance between protection of free speech under the First Amendment and protection of privacy interests. As explained below, PFF supports grant of Trans Union LLC's petition for certiorari because it believes the D.C. Circuit's decision affirming the Federal Trade Commission's speech ban unwarrantedly inflicts too much damage on traditional First Amendment jurisprudence in the name of protecting privacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the lawfulness of a Federal Trade Commission ("FTC") order determining that target marketing lists sold by petitioner Trans Union to its customers are "consumer reports" under the Fair Credit Reporting Act and, therefore, could no longer be disclosed.[5] The Court of Appeals rejected Trans Union's argument that the FTC's ban on the dissemination of the lists violated petitioner's First Amendment rights. *Trans Union Corporation v. Federal Trade Commission*, 245 F. 3d 809 (D.C. Cir. 2001), *rehearing denied*, 267 F. 3d 1138 (2001).

Central to the lower court's First Amendment holding was its view that the contested speech "relates to no matter of public concern" and that, therefore, under this Court's disposition of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), such speech warrants reduced constitutional protection. 245 F. 3d at 818. In denying rehearing, the court put it bluntly: "[T]he important point is that here, as in *Dun & Bradstreet*, the targeted speech *solely* interests the

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[5] As explained in the Trans Union petition at 4, in the context of this case, the term "target marketing" involves the communication of lists of consumer names and addresses having certain characteristics. It is designed to identify a group of consumers who may be interested in a product or service. "Prescreening" is a form of target marketing designed to identify consumers who qualify for a specific credit or insurance offer.

speaker (Trans Union) and its 'specific business audience' (its customers)." 267 F. 3d at 1139 (emphasis supplied). According to the D.C. Circuit, Trans Union's First Amendment challenge should be denied because the "target marketing lists comprise speech of *purely* private concern." *Id.*

Another central underpinning of the court of appeal's decision was its conscious downplaying of the availability of less restrictive means to protect the free speech rights of Trans Union. Even assuming that this is a case in which intermediate rather than strict First Amendment scrutiny properly applies, the court gave short shrift to consideration of the efficacy of an "opt-out" mechanism as a less restrictive alternative that might serve to protect sufficiently the privacy interest the government is seeking to protect.[6]

In its principal decision, the court of appeals simply stated, incorrectly we believe, that: "Because the FCRA is not subject to strict First Amendment scrutiny, however, Congress had *no* obligation to choose the least restrictive means of establishing its goal." 245 F. 3d at 809. In its rehearing decision, the court seemed to back away somewhat from its initial position that, even under intermediate scrutiny, the government is not obliged to choose narrowly tailored means to achieve its governmental objective. Nevertheless, it brushed off without serious analysis the benefits and costs of the less restrictive opt-out alternative. It did so based on its view that Congress "apparently believes" that consumers are more willing to reveal personal information in return for guaranteed offers of credit and insurance than with regard to

[6] "Opt-out" refers to a default rule for use of information under which the information disseminator has the right to use an individual's information unless he or she requests that it not be used. "Opt-in" refers to a default rule under which an individual must affirmatively consent to have his or her information disseminated.

other types of target marketing offers and that, therefore, opt-out is sufficiently protective of privacy with regard to credit and insurance offers but not other types of target marketing.[7]

No one disputes that recent advances in technology have reduced the costs of gathering, storing, manipulating, and disseminating information. It is also generally acknowledged that these technological advances have heightened concerns on the part of many about the information being collected, how it is being used, and who has access to it. These privacy concerns have led to a number of new government restrictions on the use and dissemination of personal information, and more such privacy laws and regulations are proposed all the time. In the context of these calls for more government-imposed information dissemination restrictions in the name of privacy, it is easy to forget, as Professor Eugene Volokh put it so well, that: "[T]he right to information privacy—my right to control your communication of personally identifiable information about me—is a right to have the government stop you from speaking about me."[8]

The Court should grant the Trans Union petition to ensure that First Amendment interests receive proper protection in this era in which courts increasingly will confront cases involving speech regulation in the name of privacy. To be sure, it will be necessary in these cases to balance the speaker's First Amendment rights in disseminating information against the government's interest in protecting privacy. By deciding this case, the Court can affirm the

[7] 267 F. 3d at 1142. The Fair Credit Reporting Act, 15 U.S.C. §§ 1681b(e); 1681m(d)(1), provides that a consumer may opt-out of credit and insurance target marketing.

[8] Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People Speaking About You*, 52 STAN. L. REV. 1049, 1050-51 (2000).

vitality of certain fundamental First Amendment principles in the face of what are likely to be more frequent attempts to regulate information dissemination under the privacy rubric.

In particular, from PFF's perspective as a research and educational foundation with experience in both the privacy and First Amendment areas, the Court should take this case to correct the D.C. Circuit's view that the targeted marketing at issue is speech of "purely private concern." This view misunderstands the role such speech plays in furthering the larger public interest in an efficiently functioning free marketplace. And the Court should correct the D.C. Circuit's view that it need not evaluate substantively more narrowly tailored forms of speech regulation if privacy concerns are offered as justifications for such regulation. In the Argument below, we address these two points at greater length.

ARGUMENT

I. THE TARGET MARKETING AT ISSUE IS NOT SPEECH OF PURELY PRIVATE CONCERN

As explained above, relying on the plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the court of appeals accorded petitioner's target marketing speech "only qualified constitutional protection" on the basis that it was of "purely private concern." 267 F. 3d at 1139. PFF agrees with petitioner that the diminished First Amendment protection that the plurality accorded the credit report in the *Dun & Bradstreet* defamation context appears largely to have rested on the fact that the information was "wholly false" and "was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further." 472 U.S. at 762. There is no intimation that the

target marketing speech at issue in this case contains "wholly false" information, so *Dun & Bradstreet* is distinguishable on that basis alone.[9]

Even assuming the validity of the public/private distinction, however, the D.C. Circuit was wrong to characterize the speech at issue here as of purely private concern. It is not true, as the D.C. Circuit claims, that "the targeted speech solely interests the speaker (Trans Union) and its 'specific business ... e' (its customers)." 267 F.3d at 1139. Without warrant, this view denigrates the public interest served by target marketing in today's information economy.

The speech in this case is of public concern because society at large benefits significantly from the targeted advertising that is restricted by the government's ban on information dissemination. Foremost, targeted advertisements provide consumers with valuable information. As PFF senior fellows Paul Rubin and Thomas Lenard explain in their recently published book, *Privacy and the Commercial Use of Personal Information*:

> The modern theory of advertising indicates that most or all advertising provides valuable information, and if advertising leads to sales then at least some subset of consumers is benefiting from the advertising. Even if some information does not lead directly to a purchase, the information may still be valuable to the consumer. For example, it may better enable the consumer to compare prices among products, or to determine what products are available.[10]

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[9] In any event, making First Amendment protection dependent upon whether the speech is of "public" or "private" concern is problematical because of the difficulty of drawing such a "slippery slope" distinction. *See* Eugene Volokh, *supra* note 8, at 1088-1105.

[10] Rubin and Lenard, *supra* note 3, at 23. See also, Carl Shapiro and Hal R. Varian, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY (Harvard Business School Press 1999).

Moreover, the information used for targeted advertising enables recipients of advertisements to avoid the nuisance of receiving unwanted ads that are of no interest to them and allows marketers to avoid the expense of sending unwanted ads. Rubin and Lenard explain that: "[B]oth consumers and advertisers have incentives to more accurately target messages. Consumers gain because they receive fewer unwanted messages, and advertisers gain because consumers pay more attention to their messages."[11] Put simply, "[a]partment dwellers don't want information about aluminum siding, for example, and childless couples don't need to learn about infant formula specials."[12] By enabling businesses to reach the "right" customers, targeted advertising substantially reduces the cost of direct marketing, thereby allowing businesses to offer their products at lower prices than otherwise would be the case.[13] Conversely, any regulation that raises the costs of advertising and of obtaining customer lists makes it more difficult for new entrants to compete and adversely affects competition.[14]

At bottom, and most fundamentally, the information dissemination restrictions at issue here are not "of purely private concern" because their imposition has substantial adverse societal impacts. One of the most important characteristics of information, in terms of its contribution to the nation's economic welfare, is that the same information can be used productively in different ways at different times by different parties. In other

[11] Rubin and Lenard, *supra* note 3, at 23.

[12] *Id.*, at xii.

[13] *Id.*, at 11. Rubin and Lenard assert that positive externalities result from better targeting in the sense that recipients of unwanted messages not only hold the sender accountable but, due to a "spillover" effect, hold other sellers accountable as well. Thus, every time an unwanted message is received, the expected value of future messages is reduced and consumers are more likely to ignore all unsolicited messages. *Id.* at 33.

[14] *Id.*, at 78-79.

words, once the initial costs of gathering and organizing information are incurred, multiple uses can be made of the same information at a relatively low marginal cost.[15] This multiple use characteristic is an important source of economic value, and, to the extent that governmental restrictions diminish or make more costly the ability to take advantage of this "public good" aspect of information, the economic welfare of the public at large suffers.

More specifically, as Rubin and Lenard explain, if some of the information collected for the purpose of making credit or insurance decisions can be sold to third parties, such as marketers, the value of the information is increased, thereby creating incentives to increase the amount of information available. This "positive externality" effect means that not only will the credit and insurance markets function better, but so will the market for other types of information as well.[16]

In the seminal case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), this Court affirmed that, because of its importance to the public, commercial speech in the form of advertising is entitled to First Amendment protection. There, the Court emphasized that:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that

[15] *Id.*, at 24. Carl Shapiro and Hal R. Varian explain that: "Information is costly to *produce* but cheap to *reproduce*. . . . Economists say that production of an information good involves *high fixed costs* but *low marginal costs*. The cost of producing the first copy may be substantial, but the cost of producing (or reproducing) additional copies is negligible." Carl Shapiro and Hal R. Varian, *supra* note 10, at 3. (Emphasis in original).

[16] Rubin and Lenard, *supra* note 3, at 32-33.

those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.[17]

In the same vein, the Court reminded that it is well to appreciate that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." 425 U.S. at 770. The Court should grant the Trans Union petition because the court of appeal's decision presents important issues concerning whether the channels of communication in our free enterprise economy will be unnecessarily and unreasonably closed off in a way that harms the public interest.

II. THE D.C. CIRCUIT FAILED TO CONSIDER THE MORE NARROWLY TAILORED OPT-OUT FORM OF SPEECH REGULATION

While commercial speech may be subject only to intermediate scrutiny under the First Amendment, the government still must demonstrate that its regulation "is not more extensive than is necessary to serve" the asserted governmental interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). In other words, the government must show its interest could not be served "by a more limited restriction on commercial speech." 447 U.S. at 564.[18] In practical terms, this means that the government must demonstrate that it has "carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

[17] 425 U.S. at 765.

[18] *See also, Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173, 174 (1999).

In this case, the court of appeals concluded that "there is no possibility that some less-restrictive or nonspeech-related regulation could achieve the identified [government] interest" without undertaking a serious analysis of more tailored alternatives. 267 F. 3d at 1141. The court dismissed the less restrictive alternative of a consumer opt-out mechanism without showing any real appreciation of the public interest trade-offs between opt-in and opt-out mechanisms. The court thought it enough merely to assert that: "Congress apparently believes that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." *Id.*, at 1142.

In its petition, Trans Union disputes the court of appeal's assertion that Congress itself rejected the use of opt-out for target marketing.[19] In any event, petitioner maintains that the specific personal information relating to prescreened credit and insurance offers authorized to be disseminated under the Fair Credit Reporting Act poses a greater threat to privacy than the information used for other types of target marketing, so that if opt-out is sufficiently protective of privacy for prescreening it should be for target marketing as well.[20]

PFF agrees that the privacy interests at stake with regard to target marketing are less than for presceening because information used for target advertising is generally used anonymously. Rubin and Lenard explain that advertisers typically are not interested in data about individuals *per se*. Rather "they purchase data about blocks of individuals who share a set of attributes." [21] A seller of automobiles does not

[19] *See* Trans Union Petition, at 26

[20] Trans Union Petition, at 26-27. Trans Union points out that even with regard to prescreening for credit or insurance offers the FTC has concluded that "there is relatively insignificant harm to the consumer because the privacy infringement is minimal in prescreening." *Id.*, citing 55 Fed. Reg. 18804, 18807 & n.14 (II 4)(May 4, 1990.)

[21] Rubin and Lenard, *supra* note 3, at 24.

ask, "What can I sell to individual X?" Instead, it asks an advertising agency to use information databases to help it target market to Y number of individuals who (by virtue of some attribute such as the age of their current vehicle) are more likely than average to be interested in considering the purchase of a new car.[22] Thus, target marketing is likely to be minimally invasive of individual privacy interests, and less invasive than prescreening for credit and insurance offers that is more dependent upon personal information.

In rejecting the less restrictive opt-out alternative, the D.C. Circuit gave virtually no weight to the societal costs imposed by requiring opt-in rather than opt-out. As Rubin and Lenard explain in their new book, because the great majority of consumers accept whatever method is used as the default, an opt-in requirement "dramatically reduce[s] the amount of information available to the economy and impose[s] substantial costs on consumers."[23] They cite recent testimony before the FTC to the effect that when the default was opt-in, 85% of consumers chose not to provide their data, whereas when the default was opt-out 95% chose to provide information.[24]

The costs imposed on society by forcing opt-in as the default method are substantial. For example, Michael A. Turner has estimated that opt-in requirements would reduce the information available to catalog and Internet apparel retailers at a cost of $1 billion in a $15 billion market. According to Turner, this $1 billion "information tax" would result in retailers passing on increased costs ranging from 3.5

[22] *Id.*, at xiii.

[23] *Id.*, at xxi.

[24] *Id.*, at xxi, n.19, citing Testimony of Parry Ponemon, Price WaterhouseCoopers, at FTC Hearing, "Wireless Web, Data Services and Beyond: Emerging Technologies and Consumer Issues," December 12, 2000, Vol. 2, p. 232.

to 11 percent.[25] In a study released in January 2002, Turner and Lawrence G. Buc estimated the impact of adoption of opt-in restrictions on charitable organizations. They calculated that "should an 'opt-in' style third party data restriction become law, administrative costs for charitable organizations would increase by 30 percent, and would force charities to spend 53 cents to raise a dollar of donations due to the lower response rates."[26] According to Turner and Buc, with an opt-in restriction as law, approximately $16.5 billion currently allocated to charitable programs will be spent on additional marketing costs."[27]

And in yet another recent study, Peter A. Johnson and Robin Varghese examined the impact of opt-in restrictions in California for only the financial services, charitable organizations, and non-store retailing sectors. They concluded that such restrictions on data sharing "would likely cost California consumers, employees, and taxpayers, several billion dollars" and "cost California charities $1.57 billion in revenue lost to programs."[28] Clearly, the costs imposed on society by requiring that opt-in rather than opt-out be used are very substantial if measured solely in economic terms. Viewed more broadly, the societal losses are also real, even if less

[25] Michael A. Turner, Executive Director, Information Services Executive Council of the Direct Marketing Association, "The Impact of Data Restrictions on Consumer Distance Shopping," at 7, available at *http://www.the-dma.org.isec9.pdf*, posted in March 2001.

[26] Michael A. Turner, Executive Director, Information Services Executive Council of the Direct Marketing Association, and Lawrence G. Buc, President, SLS, "The Impact of Data Restrictions on Fundraising for Charitable & Nonprofit Institutions," January 2002, at 4.

[27] *Id.*

[28] Peter A. Johnson, Adjunct Professor, School of International and Public Affairs, Columbia University, and Robin Varghese, Graduate School of Arts and Sciences, Columbia University, "The Hidden Cost of Privacy: The Potential Economic Impact of 'Opt-In' Data Privacy Laws in California," January 24, 2002, at 2.

readily economically quantifiable, for example, when charitable organizations are forced to curtail core programmatic activities in order to devote more resources to raising funds under opt-in regimes than would be required under the opt-out alternative.

The cursory treatment that the D.C. Circuit gave to the question whether a more narrowly tailored regulation would satisfy the government's interest stands in stark contrast to the Tenth Circuit's consideration of this question in *U.S. West, Inc. v. United States*, 182 F. 3d 1224 (10th Cir. 1999), *cert. denied*,120 S. Ct. 2215 (2000). In *U.S. West*, the court vacated a Federal Communications Commission order that mandated an opt-in mechanism before telephone companies could disclose their customers' information for marketing purposes. While assuming for the sake of argument that the agency's regulation served a substantial government interest in protecting privacy, the court invalidated the restriction because "the FCC's failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates it did not narrowly tailor" the regulation. 182 F. 3d at 1238-39. The court said the agency's speculation that "there are a substantial number of individuals who feel strongly about their privacy" is not enough to pass constitutional muster; rather in light of the free speech rights at stake, the government must "show that an opt-out strategy would not sufficiently protect customer privacy." *Id.*, at 1239.

In the present case, the D.C. Circuit was content to rely on what it (assertedly mistakenly) understood to be Congress's rejection of the opt-out method for target marketing other than prescreened credit or insurance offers, rather than engaging in the type of more substantive analysis performed by the Tenth Circuit in the *U.S. West* case and required by the First Amendment. As we enter an era in which there almost certainly will be an increasing number of clashes between

privacy and free speech interests, the Court should review this case because the court below failed to consider substantively whether, on balance, a less restrictive regulation would suffice to satisfy the government's privacy objective.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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